In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 35, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA

MOTION BY THE UNITED STATES TO DISMISS THE COUNTERCLAIM AND DENY THE DEMAND FOR JURY TRIAL FILED BY THE STATE OF FLORIDA

The United States of America moves to dismiss the counterclaim and to deny the jury demand filed by the State of Florida on January 28, 1971, on the following grounds:

1. The counterclaim constitutes a suit against the United States to which the United States has not consented.

2. The counterclaim does not state a claim on which relief can be granted.

3. The jury demand in the counterclaim should be denied because the State of Florida is not a "citizen"

428-077—71

nor is this an "action at law" within the terms of 28 U.S.C. 1872.

To permit consideration of this motion within the present Term of Court, the United States of America moves that the State of Florida be required to respond hereto within thirty days of the service on it of this motion.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1971.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 35, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA

MEMORANDUM IN SUPPORT OF MOTION

INTRODUCTION

This is a suit by the United States against the thirteen Atlantic coastal states for a determination of rights in the lands and natural resources of the bed of the Atlantic Ocean more than three geographical miles from the coastline. Florida filed a motion for severance, which the Court on November 16, 1970, referred to the Special Master previously appointed in this case. The motion asserted that Florida's defenses were not the same as those of the other defendants, and on October 27, 1970, during the hearings on the Florida motion, the Special Master granted the state permission to file an Amended Answer to clarify its

defenses. On January 28, 1971, Florida filed its amended answer, including as new matter a counterclaim against the United States. The counterclaim seeks $51 million damages on the ground that the United States is seeking herein to take Florida's submerged lands without just compensation; it includes a demand for a jury trial under 28 U.S.C. 1872. By the present motion the United States asks to have Florida's counterclaim dismissed and the jury demand denied.

Florida's motion for severance has been granted by the Special Master, and we understand that his report on that motion is being filed simultaneously with this motion. In connection with the severance, the United States and Florida are also filing joint motions to consolidate the proceedings against Florida in No. 35, Original, with supplemental proceedings to be initiated against Florida in No. 9, Original, and for reference to a Master. The United States assumes that Florida's counterclaim and jury demand in No. 35, Original, if not dismissed, will remain viable under the proposed consolidated proceedings and that resolution of the issues tendered by the present motion need not precede the proposed consolidation.

Resolution of the issues tendered here, or at least of the jury trial demand, should precede the proposed reference to a Master, however. The mode of proceeding will obviously be quite different if a jury is required, either as to the counterclaim alone or on the action as a whole, than if the case is to be tried, as we contend, to

the Master alone. While a decision on the merits may obviate the issue of dismissing the counterclaim, see n. 3 *infra*, it cannot resolve this procedural issue. Nor should the jury issue be referred to the Master, as it raises strictly legal issues of a most unique character; indeed, it is not clear whether any jury trial could be held other than directly before this Court. The matter is one which can readily be resolved without oral argument in this Court; to permit its resolution during the present Term of Court, we suggest that Florida may be directed to file its response within thirty days of the service on it of this motion. That will permit Florida sufficient time for response, *cf.* Fed. R. Civ. P. 6(d), and will give this Court ample time to consider the papers and reach a decision before it rises for the summer.

I

THE COUNTERCLAIM FOR DAMAGES SHOULD BE DISMISSED

A. THE CLAIM FOR DAMAGES IS AN UNCONSENTED SUIT AGAINST THE UNITED STATES

The relief sought by the United States in its complaint is basically equitable in nature, a declaration of its rights in the subsoil, seabed, and natural resources of the continental shelf underlying the Atlantic Ocean beyond the three-mile limit, and an accounting for any money derived by the state from those lands. Implicit in the request for this relief is the possibility that Florida will be found to have the subject rights, and to be entitled to an accounting for any sums the United States has received. *Cf. United States* v.

Louisiana, 363 U.S. 1; *Id.,* 382 U.S. 288.[1] By its counterclaim, however, Florida seeks a good deal more. It asserts that the submerged lands and resources are being taken from it, and demands $51 million in "just compensation" for such taking. This claim is not fairly comprised in the matters put in issue by the United States complaint, and constitutes, in effect, a suit initiated by the state against the United States.

Florida's counterclaim thus must be dismissed as an unconsented suit against the United States. Under the Constitution, a state may not sue the United States unless Congress has consented thereto. *Kansas* v. *United States,* 204 U.S. 331; *Arizona* v. *California,* 298 U.S. 558, 568; *Minnesota* v. *United States,* 305 U.S. 382, 387. The government's immunity from suit applies not only to suits initiated by the adverse party, but also to counterclaims filed by the defendants in suits brought by the United States. *United States* v. *Shaw,* 309 U.S. 495, 500–505; *Illinois Central R.R. Co.* v. *Public Utilities Comm.,* 245 U.S. 493, 504–505. There is no reason why this rule, like the prohibition on initiating suits, should not apply equally to suits by states as to suits by individuals. *Cf. Minnesota* v. *United States,* 305 U.S. 382, 387. Neither the Court, nor the Attorney General, nor both together, can give

[1] Thus, there is no objection in this case to the fact that the State of North Carolina captioned its second defense in its Answer as "Answer, Defense, and Counterclaim". In substance, the second defense merely states the grounds on which North Carolina believes itself entitled to judgment on the issues raised in the complaint.

such consent where it has not been given by Congress.[2] The United States has at no time consented to be sued by the State of Florida on the alleged counterclaim.[3]

B. UNDER NO CIRCUMSTANCES COULD THE FACTS ALLEGED IN THE COUNTERCLAIM ENTITLE FLORIDA TO RELIEF

Quite apart from the fact that it asserts a claim on which the United States has not consented to be sued either in this court or in this way, the counterclaim should be dismissed for failure to state a claim on which relief can be granted. After asserting the basis for Florida's claim to the submerged lands and resources seaward of the three-mile limit, the counterclaim alleges that:

> 3. By now denying said title of the State of Florida, the United States of America is seeking to take said property without just compensation.

On that ground, it alleges that the state is entitled to damages in excess of $51 million. That is manifestly an untenable analysis of the litigation.

---

[2] The Court of Claims has been given jurisdiction of claims for compensation for the taking of property. 28 U.S.C. 1491; *Young Men's Christian Association* v. *United States*, 395 U.S. 85, 86 n. 1.

[3] In *United States* v. *Louisiana, et al.*, No. 11, Original, October Term, 1957, the State of Alabama included in its answer a "cross-bill" seeking a boundary determination, which was not within the issues raised by the complaint. The United States moved to dismiss the cross-bill as an unconsented suit against the United States; but the decision on the complaint having shown the cross-bill to be without merit, the Court ordered it dismissed without considering its status as an unconsented suit against the United States. *United States* v. *Louisiana, et al.*, 363 U.S. 1, 83–84 n. 141.

This is a suit by the United States, in the nature of a suit to quiet title, by which the United States seeks to establish that, as against the State of Florida, the United States now has exclusive rights to the natural resources of the continental shelf more than three miles from the coastline in the Atlantic Ocean. *Cf. United States* v. *Louisiana, et al.*, 363 U.S. 1; *United States* v. *Florida,* 363 U.S. 121. Florida, on the other hand, claims to have rights in the natural resources beyond the three-mile limit in the Atlantic, either by virtue of the Act of 1868 approving the Florida Constitution, 15 Stat. 73, or under the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301–1315, or perhaps on some other basis.

For present purposes, it is unnecessary either to analyze or to evaluate the grounds on which either party claims to be entitled to these natural resources. What is important is that the suit is not one to transfer rights, but rather is one to determine which party is entitled to them under the present state of affairs. If Florida prevails, it will keep the rights found to belong to it, and there will be no taking. If the United States prevails, it will be because Florida has and had no rights. Florida will have lost nothing in that event, because it had nothing to lose. No outcome of the case can take anything from Florida. The counterclaim, seeking compensation for rights allegedly being taken from Florida by this proceeding, does not state a claim on which relief can be granted.

II

THE DEMAND FOR A JURY TRIAL SHOULD BE DENIED

The State of Florida relies on 28 U.S.C. 1872, citing the case of *Georgia* v. *Brailsford*, 3 Dall. 1, as authorizing a demand for a jury trial on its alleged counterclaim. Amended Answer of the State of Florida, p. 7. That section reads: "In all original *actions at law* in the Supreme Court against *citizens* of the United States, issues of fact shall be tried by a jury." (Emphasis added.)

The State of Florida cannot be construed to be a "citizen" under the terms of Section 1872. The cases construing the term "citizen" as used in other sections of 28 U.S.C. clearly distinguish a state from a "citizen." *City Bank Co.* v. *Schnader*, 291 U.S. 24, 29 (diversity); *State Highway Comm.* v. *Utah Co.*, 278 U.S. 194, 200 (diversity); *Arkansas* v. *Kansas & Texas Coal Co.*, 183 U.S. 185, 188 (diversity); *Postal Telegraph Cable Co.* v. *Alabama*, 155 U.S. 482, 487 (diversity); *Central Stikstof Verkoopantoor, N.V.* v. *Alabama State Docks Dept.*, 415 F.2d 452, 457 (C.A. 5) (diversity); *Riley* v. *Worcester County Trust Co.*, 89 F. 2d 59, 64 (C.A. 1) (interpleader); Jud. Act of 1789 § 13, 1 Stat. 73, 80–81. We see no reason why the construction given to the term "citizen" in those cases is not equally applicable to Section 1872.

Moreover, the demand for a jury trial under Section 1872 is subject to the additional infirmity that this case is not an "action at law." This proceeding is in the nature of a quiet title action and as such is a suit in equity. Section 1872 is by its terms appli-

cable only to actions at law. *United States* v. *Louisiana et al.*, 339 U.S. 699 (1950). The Court in *United States* v. *Louisiana, et al.*, considered demands by the States of Louisiana and Alabama for jury trials. By its complaint in that case the United States raised the same issues and sought the same relief that it is seeking in the present case. The demands of both of those states for a jury trial in that case were denied, the Court declaring with respect to Louisiana's motion for a jury trial (339 U.S. at 706):

> We need not examine it [Louisiana's motion] beyond noting that this is an equity action for an injunction and accounting. The Seventh Amendment and the statute,[4] assuming they extend to cases under our original jurisdiction, are applicable only to actions at law. * * *

The case which Florida cites in support of its jury demand, *Georgia* v. *Brailsford*, 3 Dall. 1, is not applicable to the case at hand since that case did not involve a suit between the United States and a state; that case was an action at law against citizens of the United States.

---

[4] 28 U.S.C. 1872.

CONCLUSION

For the foregoing reasons, the State of Florida should be directed to respond to this motion within thirty days of service, the counterclaim which the State of Florida asserts in its amended answer to the complaint should be dismissed, and the demand for a jury trial should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971